

SUPER LAW GROUP, LLC

March 14, 2016

Via Certified Mail, Return Receipt Requested

American United Wood, Inc.
Dominic Tortorici
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Staten Island, NY 10303

American Materials, Inc.
Paul Castellano, Jr.
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Staten Island, NY 10303

Boro Ready Mix, Inc.
2945 Richmond Terrace
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Granite Ready Mix, Inc.
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Scara-Mix, Inc.
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Paul Castellano, Jr.
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Dominic Tortorici
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Storage Bin, Inc.
2945 Richmond Terrace
Staten Island, NY 10303

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear All,

We are writing on behalf of Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper),¹ ("Baykeeper") to notify you of their intent to file suit against American United Wood, Inc., American Materials, Inc., Boro Ready Mix, Inc., Granite Ready Mix, Inc., Scara-Mix, Inc., Storge Bin, Inc., Paul Castellano, Jr., and Dominic Tortorici (collectively, "American United") pursuant to Section 505(a) of the federal Clean Water Act ("CWA")² for violations of the CWA.

Baykeeper intends to file suit, as an organization and on behalf of its adversely affected members, in the United States District Court for the Eastern District of New York seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this letter.³

¹ Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper), is a non-profit public interest 501(c)(3) corporation, whose mission is to protect, preserve, and restore the ecological integrity and productivity of the Hudson-Raritan Estuary through enforcement, field work and community action. Baykeeper has approximately 350 members in the New York and New Jersey region, many of whom use and enjoy New York Harbor, which is polluted by industrial stormwater runoff discharged by facilities in New York City that are or should be covered by the General Permit and New Jersey that must comply with New Jersey's Basic Industrial Stormwater General Permit.

² 33 U.S.C. § 1365(a). We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

³ See 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

Baykeeper intends to take legal action because American United is discharging polluted stormwater from American United's material recycling facility at 2945 Richmond Terrace, Staten Island, NY ("the Facility") to the waters of the United States without a permit in violation of Sections 301(a) and 402(p)(2)(B) of the Clean Water Act.⁴ Further, American United has not applied for coverage under, nor complied with the conditions of, an individual National Pollutant Discharge Elimination System ("NPDES") permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity ("General Permit")⁵ issued by the New York State Department of Environmental Conservation ("DEC"), in violation of Sections 402(p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into New York Harbor, Long Island Sound, and other receiving waters. The consensus among agencies and water quality specialists is that stormwater⁶ pollution accounts for more than half of the total pollution entering the marine environment each year.

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in the State as "impaired," or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.⁷ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Stormwater discharges flow from the Facility into the Kill Van Kull. The Kill Van Kull is located between Staten Island and Bayonne, New Jersey and connects Newark Bay to the Upper New York Bay, which is fed by the Hudson and East Rivers and connects to the Lower New York Bay and the Atlantic Ocean. DEC has classified the Kill Van Kull as an "SD" water.⁸

⁴ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

⁵ New York State Department of Environmental Conservation, *SPDES Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity*, Permit No. GP-0-12-001, (hereinafter "General Permit"), available at <http://www.dec.ny.gov/chemical/9009.html>. This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

⁶ Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. See 40 C.F.R. § 122.26(b)(13).

⁷ See EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofmpub.epa.gov/waters10/attains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited June 23, 2015).

⁸ See 6 N.Y.C.R.R. § 890.

Under New York's Water Quality Standards, a waterbody that is designated as "SD" shall be suitable for fish, shellfish, and wildlife survival.⁹

The New York Water Quality Standards also set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease, suspended and settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet these numeric and narrative criteria in order to support its designated uses.¹⁰ The Kill Van Kull consistently fails to meet state water quality standards and illegal stormwater discharges from this Facility contribute to this failure.¹¹ DEC has designated the Kill Van Kull as impaired pursuant to Section 303(d) of the CWA¹² for failure to meet minimum water quality standards for a number of pollutants.¹³ These pollutants include floatables, dioxin, and other toxics including mercury and other heavy metals.¹⁴ DEC also indicates that "Urban Stormwater Runoff," which includes the Facility's illegal stormwater discharges, contributes significantly to the Kill Van Kull's impaired status.¹⁵

While the Kill Van Kull is one of the most heavily traveled water ways on the east coast, its water quality should not be sacrificed to pollutants from industrial activity. Various levels of the government are making significant efforts to improve the Kill Van Kull's water quality. For instance, in 2010, the New York City Department of Environmental Protection activated a new throttling gate at Staten Island's Port Richmond Wastewater Treatment Plant allowing excess stormwater and sewage to be stored in existing sewer lines rather than discharging directly into the Kill Van Kull.¹⁶ And the States of New York and New Jersey have been working together with U.S. Environmental Protection Agency ("EPA") for some time on plans to restore water quality throughout the New York Harbor under the Clean Water Act. It is time for American United to join fully in this effort to restore the biological integrity of the Kill Van Kull. At a minimum, American United must stop illegally discharging polluted stormwater and other effluents.

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. American United Is Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

⁹ See 6 N.Y.C.R.R. § 701.14.

¹⁰ See 6 N.Y.C.R.R. §§ 702, 703.

¹¹ See NY DEC, *Proposed Final 2014 New York State Section 303(d) List* (June 2014), available at: <http://www.dec.ny.gov/chemical/31290.html>.

¹² 33 U.S.C. § 1313(d).

¹³ *Id.* at 9.

¹⁴ 303(d) List at 9, 25, and fn 68.

¹⁵ 303(d) List at 9.

¹⁶ Press Release, NYC Department of Environmental Protection, DEP Completes Project to Improve Water Quality in Kill Van Kull (May 19, 2010), available at http://www.nyc.gov/html/dep/html/press_releases/10-51pr.shtml#VYHVZIVViko.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹⁷ American United's industrial activity at the Facility has caused and continues to cause a "discharge of pollutants" within the meaning of Section 502(12) of the CWA¹⁸ and a "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14) from the Facility on at least each and every day that there has been a rain event of more than 0.1 inches.¹⁹ The Facility has exposed and continues to expose industrial pollutants to stormwater, at a minimum, by (a) receiving, storing, processing, and transporting wood products and construction related waste materials outside or otherwise exposing them to the elements and (b) from vehicles entering and leaving the Facility that track pollutants off site, as well as onsite vehicle maintenance. During precipitation events (including runoff from rainfall and snow or ice melt events), pollutants are carried away from the Facility in stormwater discharges.

Specifically, American United's activities at the Facility include but are not limited to the purchase, collection, processing, and outdoor storage of lumber, scrap wood, wood chips, saw dust, sand and gravel, and construction and demolition debris. Baykeeper believes the Facility also houses a fleet of trucks and off-road vehicles and that American United engages in vehicle washing, fueling, and maintenance. These activities also involve the storage of other industrial equipment. In carrying out these activities at the Facility, American United stores and handles materials in a manner that exposes them to precipitation and snowmelt. Much of this activity is conducted outdoors. In particular, raw and processed materials piles, machinery, and trucks are left exposed to the elements and can release pollutants onto the Facility property.

In addition, machinery on the site may release fuel, oil, lubricants, PCBs, PAHs, an array of metals, pH-affecting substances and chemical residue. These toxic pollutants are often generated in the form of small particulate matter, which settles on the ground and other surfaces that are exposed to stormwater and non-stormwater flows. Also, vehicles at the Facility may expose many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids.

Because American United fails to adequately fence, shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Stormwater picks up sediment, oil, grease, metals, paints, plastic, solvents, nutrients, pathogens, particulates, dust, and other solids that can dissolve or suspend in stormwater, and other trash and pollutants associated with the Facility's operations. Stormwater, objects, and debris are then conveyed off-site and into waters of the United States. Further, vehicles at the Facility track dust, particulate matter, and other contaminants to areas on and off the premises from which these pollutants can enter stormwater and, ultimately, waters of the United States.

¹⁷ See CWA §§ 301(a), 402.

¹⁸ 33 U.S.C. § 1362(12).

¹⁹ EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. See, e.g., 40 C.F.R. § 122.26(c)(1)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

Polluted stormwater discharges flow from the Facility into the Kill Van Kull, which is a “water of the United States,” as defined in 40 C.F.R. § 122.2 and, therefore, a “navigable water” as defined in Section 502(7) of the CWA. American United does not have a NPDES permit for these discharges of pollutants. Thus, American United is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under Sections 301 and 402 of the CWA.

B. American United is Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

American United collects and processes wood waste and construction and demolition debris, and other scrap materials. American United has registered the Facility with the State of New York as a solid waste management facility. Accordingly, American United operates a “material recycling facility” as defined in the General Permit and is an industrial discharger engaged in scrap and waste material processing, which is an industrial activity included in sector N of the General Permit. Further, to provide these “Sector N” services, American United maintains a fleet of trucks and performs vehicle maintenance on its trucks and heavy industrial equipment at the Facility. Accordingly, American United also engages in “land transportation” industrial activities and must comply with the General Permit’s Sector P (“Land Transportation and/or warehousing”) requirements.

Pursuant to Section 402(p) of the CWA and regulations promulgated by EPA pursuant to the CWA, American United must apply for coverage under the General Permit or an individual NPDES permit for American United’s discharge of polluted stormwater. In addition, American United must apply for an individual NPDES permit if the Facility is discharging process wastewater, or has any other non-stormwater discharge containing pollutants that is not authorized by the General Permit. By failing to apply for coverage under the General Permit or an individual permit, American United is violating CWA Sections 301(a) and 402(a) and (p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).²⁰

To be eligible to discharge under the General Permit, American United must submit to DEC a registration form called a “Notice of Intent.”²¹ Notice of Intent forms are available online from

²⁰ Sections 301(a) and 402(a) and (p) make it unlawful for American United to discharge stormwater associated with industrial activity without obtaining a NPDES permit. 40 C.F.R. Sections 122.26(c)(1) and (e)(1) require American United to apply for a NPDES permit that covers American United’s discharge of stormwater associated with industrial activity.

²¹ See General Permit, Part I.E.3. In notifying American United that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, Baykeeper does not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C of the permit.

DEC.²² To register, American United is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.²³ American United has failed to prepare and file a Notice of Intent or an application for an individual permit.²⁴

C. American United is Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, American United must comply at all times with the requirements of the General Permit (or an individual permit).²⁵ By discharging stormwater associated with industrial activity without complying with the General Permit, American United is violating CWA Sections 301(a) and 402(a) and (p).²⁶ The main General Permit requirements that American United has failed and continues to fail to meet are explained further below.

1. American United has not developed and implemented a Stormwater Pollution Prevention Plan.

Before submitting a Notice of Intent, American United must prepare, make available, and implement a Stormwater Pollution Prevention Plan ("SWPPP") in accordance with schedules established in the General Permit.²⁷ The SWPPP must identify potential sources of pollution that may affect the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the discharge of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.²⁸

Among other things, the SWPPP must include: a general site description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential

²² See http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²³ See Division of Water, NY DEC, *Notice of Intent For Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)* (2012), available at: http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²⁴ A thorough search of EPA's Enforcement & Compliance History Online ("ECHO") database and DEC's records reveals that no Notice of Intent has been submitted for the Facility.

²⁵ This section discusses the compliance requirements of the General Permit. If American United elects to seek coverage under an individual NPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus American United will still be required to comply with all of the following.

²⁶ Sections 301(a) and 402(a) and (p) make it unlawful for American United to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

²⁷ See General Permit Part III.B.

²⁸ See General Permit Part III.A.

pollutant sources, a description of control measures and best management practices, and schedules and procedures for implementation of control measures, monitoring and inspections.²⁹ American United has not developed and implemented a legally compliant SWPPP, as required by Part III of the General Permit.³⁰

2. American United has not implemented control measures and Best Management Practices that meet the best available technology standards.

American United cannot legally discharge stormwater under the General Permit until it implements mandatory general and sector-specific control measures called Best Management Practices (“BMPs”) in order to minimize the discharge of pollutants from the Facility.³¹ The selected measures must reduce the discharge of pollution from the Facility to the extent practicable through use of the best available technology for the industry.

The General Permit requires that “[t]he owner or operator must select, design, install, and implement control measures (including best management practices),” in accordance with good engineering practices, to meet the effluent limits contained in the permit.³² The General Permit’s effluent limits include both numeric limits specific to certain sectors,³³ as well as non-numeric technology-based effluent limits that apply to all facilities.³⁴ These non-numeric technology-based restrictions include minimizing the exposure of pollutants to stormwater³⁵ and minimizing the discharge of pollutants in stormwater³⁶ “to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”³⁷

American United has not minimized the discharge of pollution to the extent achievable by implementing control measures or BMPs that are technologically achievable and economically practicable and achievable in light of best industry practice, as required by Parts I.B.1 and VIII of the General Permit.

3. American United has not conducted routine site inspections and complied with monitoring, recordkeeping, and reporting requirements.

American United must conduct an annual comprehensive site inspection and evaluation of areas where industrial materials or activities are exposed to precipitation or where spills and leaks have

²⁹ See General Permit Part III.C.

³⁰ Notifier believes no SWPPP exists. If a SWPPP exists, then it is either facially inadequate or has not been fully and adequately implemented.

³¹ See General Permit Part I.B.1, see also Part VII (setting forth sector-specific control measures and practices).

³² General Permit Part I.B.1.a; see also Part III.C.7 (“The SWPPP must document the location and type of BMPs installed and implemented at the facility to achieve the non-numeric effluent limits in Part I.B.1.a.(2) and where applicable in Part VIII, and the sector specific numeric effluent limitations in Part VIII.”).

³³ See General Permit, Part VIII.

³⁴ See General Permit, Part I.B.1.a.2.

³⁵ See General Permit, Part I.B.1.a.2.a.

³⁶ See General Permit, Part I.B.1.a.2.f.

³⁷ General Permit, Part I.B.1.

occurred within the past three years.³⁸ The inspection must ensure that all stormwater discharges are adequately controlled and that all BMPs are functioning as expected.³⁹ Records of this inspection must be kept for five years.⁴⁰

In addition, qualified facility personnel must carry out routine inspections at least quarterly.⁴¹ During these inspections, personnel must evaluate conditions and maintenance needs of stormwater management devices, detect leaks and ensure the good condition of containers, evaluate the performance of the existing stormwater BMPs described in the SWPPP, and document any deficiencies in the implementation and/or adequacy of the SWPPP.⁴² Such deficiencies must then be addressed through corrective actions.

The General Permit also requires that all covered facilities conduct multiple types of analytical monitoring, and DEC may require additional individualized monitoring as well.⁴³ In particular, all facilities authorized under the General Permit must:

- collect and analyze stormwater samples for each outfall at least annually;⁴⁴
- conduct visual monitoring of stormwater discharges at least quarterly;⁴⁵
- perform an annual dry weather inspection to detect non-stormwater discharges;⁴⁶
- inspect, sample and monitor discharges from coal pile runoff;⁴⁷
- inspect, sample and monitor discharges from secondary containment structures and transfer areas;⁴⁸
- document storm events during which any samples are taken;⁴⁹
- document all of these monitoring activities;⁵⁰
- keep records of the monitoring with the Facility's SWPPP;⁵¹ and
- submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of any required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.⁵²

³⁸ See General Permit, Part IV.A.1

³⁹ See General Permit, Part IV.A.1

⁴⁰ See General Permit, Part IV.A.2

⁴¹ See General Permit, Part III.C.7.b.2.

⁴² See General Permit, Part III.C.7.b.1 and b.3.

⁴³ See General Permit, Part IV.B.3.

⁴⁴ See General Permit, Part IV.B.1.c (requiring at least annual collection and analysis of stormwater samples). See General Permit, Part IV.B.1.d, e, f, and g for obligations to sample more frequently.

⁴⁵ See General Permit, Part IV.B.1.a.

⁴⁶ See General Permit, Part IV.B.1.b.

⁴⁷ See General Permit, Part IV.B.1.d.

⁴⁸ See General Permit, Part IV.B.1.f.

⁴⁹ See General Permit, Part IV.B.2.c.

⁵⁰ See, e.g., General Permit, Parts IV.B.1.a.8, IV.B.1.b.4, IV.B.1.c.9, *see generally* Part IV.E.

⁵¹ See General Permit, Part IV.E.

⁵² See General Permit, Part IV.B.1 and 2 and Part IV.C.

Because American United engages in industrial activities associated with Sector N and Sector P, sampling is required for:

- Total Mercury;
- PCBs;
- Total Suspended Solids;
- Total Recoverable Aluminum;
- Total Recoverable Cadmium;
- Total Chromium;
- Total Recoverable Copper;
- Total Recoverable Iron;
- Total Recoverable Lead;
- Total Recoverable Zinc;
- Oil & Grease;
- Chemical Oxygen Demand;⁵³
- Benzene;
- Ethylbenzene;
- Toluene; and
- Xylene.⁵⁴

Baykeeper is not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above are carried out at the Facility, other sampling may be required as well.⁵⁵ This notice provides American United with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

American United has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. American United also has failed to retain records and submit monitoring reports to DEC as required by, at least, Parts IV and VIII of the General Permit.

4. American United has failed to comply with additional requirements located in Part VIII of the General Permit.

As noted above, the General Permit contains various requirements specific to Sector N. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:

- A requirement that the SWPPP include a program to control materials received for processing:
 - Notifying suppliers/public which scrap materials will not be accepted at the facility or are only accepted under certain conditions;

⁵³ See General Permit, Part VIII, Sector N.

⁵⁴ See General Permit, Part VIII, Sector P.

⁵⁵ See General Permit, Part VIII.

- Develop and implement procedures to inspect inbound shipments of recyclable materials;
 - Develop and distribute educational material targeting the public and/or commercial drivers of inbound vehicles; and
 - Training targeted for personnel engaged in the inspection and acceptance of inbound recyclable materials.
- A requirement that the SWPPP address BMPs to minimize contact of particulate matter from materials stored indoors or under cover from coming in contact with surface runoff. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Good housekeeping measures, including frequent sweeping of haul and access roads and the use of dry absorbent or wet vacuum clean up methods, to contain or dispose/recycle residual liquids originating from recyclable containers; and
 - Good housekeeping measures to prevent the accumulation of particulate matter and fluids, particularly in high traffic areas.
- A requirement that the SWPPP describe BMPs to minimize contact of stormwater runoff with stockpiled materials, processed materials and non-recyclable wastes. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Store the equivalent one day's volume of recyclable materials indoors;
 - Containment of diversion structures such as dikes, berms, culverts, trenches, elevated concrete pads, and grading installed where appropriate to minimize contact of stormwater runoff with outdoor processing equipment or stored materials;
 - Diversion of runoff away from storage areas via dikes, berms, containment trenches, culverts and surface grading;
 - Cover containment bins, dumpsters, roll off boxes;
 - Permanent or semi permanent covers over areas where materials are transferred, stored or stockpiled;
 - Install a sump/pump with each containment pit, and discharge collected fluids to a sanitary sewer system; and
 - Sediment traps, vegetated swales and strips, catch basin filters and sand filters to facilitate settling or filtering of sediments.
- A requirement that the SWPPP address BMPs to minimize contact of residual liquids and particulate matter from materials stored indoors or under cover from coming in contact with surface runoff. The SWPPP shall document consideration of the following BMPs (or their equivalents):
 - Prohibit the practice of allowing washwater from tipping floors or other processing areas from discharging to the storm sewer system;
 - Disconnect or seal off all floor drains connected to the storm sewer system;
 - Drums containing liquids, especially oil and lubricants, should be stored: indoors; in a bermed area; in overpack containers or spill pallets; or in similar containment devices;

- Drip pans or equivalent measures shall be placed under any leaking piece of stationary equipment until the leak is repaired. The drip pans shall be inspected for leaks and potential overflows and all liquids properly disposed of in accordance with RCRA requirements; and
- Liquid wastes, including used oil, shall be stored in materially compatible and non leaking containers, and be disposed or recycled in accordance with all requirements under the RCRA, and State or local requirements.

The General Permit also contains various requirements specific to Sector P facilities. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:

- A requirement to describe and assess in American United's SWPPP the potential for the following to contribute pollutants to stormwater discharges:
 - On-site waste storage or disposal;
 - Dirt/gravel parking areas for vehicles awaiting maintenance; and,
 - Fueling areas.
- A requirement that the following areas/activities be included in all inspections:
 - Storage area for vehicles/equipment awaiting maintenance;
 - Fueling areas;
 - Indoor and outdoor vehicle/equipment maintenance areas;
 - Material storage areas;
 - Vehicle/equipment cleaning areas; and
 - Loading/unloading areas.
- A requirement that employee training take place, at a minimum, annually (once per calendar year) and address the following, as applicable:
 - Used oil and spent solvent management;
 - Fueling procedures;
 - General good housekeeping practices;
 - Proper painting procedures; and
 - Used battery management.
- A requirement that storage of vehicles and equipment awaiting maintenance with actual or potential fluid leaks be confined to designated areas (delineated on the site map). The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - The use of drip pans under vehicles and equipment;
 - Indoor storage of vehicles and equipment;
 - Installation of berms or dikes;
 - Use of absorbents;
 - Roofing or covering storage areas; and
 - Cleaning pavement surface to remove oil and grease.

- A requirement that the SWPPP describe and provide for implementation of measures that prevent or minimize contamination of the stormwater runoff from fueling areas. The SWPPP shall document consideration of the following measures (or their equivalents):
 - Covering the fueling area;
 - Using spill/overflow protection and cleanup equipment;
 - Minimizing stormwater run-on/runoff to the fueling area;
 - Using dry cleanup methods; and
 - Treating and/or recycling collected stormwater runoff.
- A requirement that storage vessels of all materials (e.g., for used oil/oil filters, spent solvents, paint wastes, hydraulic fluids) are maintained in good condition, so as to prevent contamination of stormwater, and plainly labelled (e.g., "used oil," "spent solvents," etc.). The SWPPP shall document considerations of the following storage-related BMPs (or their equivalents):
 - Indoor storage of the materials;
 - Installation of berms/dikes around the areas, minimizing runoff of stormwater to the areas;
 - Using dry cleanup methods; and
 - Treating and/or recycling the collected stormwater runoff.
- A requirement that the SWPPP describe and provide for implementation of measures that prevent or minimize contamination of stormwater runoff from all areas used for vehicle/equipment cleaning. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Performing all cleaning operations indoors;
 - Covering the cleaning operation;
 - Ensuring that all wash waters drain to a proper collection system (i.e., not the stormwater drainage system unless SPDES permitted); and,
 - Treating and/or recycling the collected stormwater runoff.
- A requirement that the SWPPP describe and provide for implementation of measures that prevent or minimize contamination of the stormwater runoff from all areas used for vehicle/equipment maintenance. The SWPPP shall document consideration of the following BMPs (or their equivalents)
 - Performing maintenance activities indoors;
 - Using drip pans;
 - Keeping an organized inventory of materials used in the shop;
 - Draining all parts of fluids prior to disposal;
 - Prohibiting wet clean up practices where the practices would result in the discharge of pollutants to stormwater drainage systems;
 - Using dry cleanup methods;
 - Treating and/or recycling collected stormwater runoff; and

- Minimizing runoff/runoff of stormwater to maintenance areas.⁵⁶

American United's activities are included in the definition of industrial activity to which the CWA applies. Therefore, American United must obtain coverage under and comply with the requirements of the General Permit, including those specific to American United's industrial activities, as described in Part VIII and outlined above. American United has failed to obtain coverage under the General Permit and comply with these additional requirements.

5. American United is clearly violating the Clean Water Act.

In sum, American United's discharge of stormwater associated with industrial activities without a permit, American United's failure to apply for permit coverage, and American United's failure to comply with the above-listed conditions of the General Permit (or an individual NPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

American United Wood, Inc., American Materials, Inc., Boro Ready Mix, Inc., Granite Ready Mix, Inc., Scara-Mix, Inc., Storage Bin, Inc., Paul Castellano, Jr., and Dominic Tortorici ("American United") are the persons, as defined by Section 502(5) of the CWA, responsible for the violations alleged in this Notice. American United has operational control over the day-to-day industrial activities at this Facility. Therefore, American United is responsible for managing stormwater at the Facility in compliance with the CWA. Baykeeper hereby puts American United on notice that if Baykeeper subsequently identify additional persons as also being responsible for the violations set forth above, Baykeeper intends to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 2945 Richmond Terrace, Staten Island, NY. To avoid all doubt, the Facility can also be identified by its Block and Lot numbers as designated by the City of New York: Block 1206, Lot 1 and Block 1205, Lot 27. The waterfront edge of the Facility runs along and discharges directly into the Kill Van Kull overland. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facility in general and in the inadequate documents themselves.⁵⁷

⁵⁶ See General Permit, Part VIII, Sector P.

⁵⁷ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. See, e.g., *Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), aff'd 236

V.

DATES OF VIOLATION

Every day upon which American United has failed to apply for permit coverage since American United first commenced operations at the Facility and discharged polluted stormwater is a separate violation of Section 301(a) of the CWA and EPA's regulations implementing the CWA.⁵⁸ These days of violation have continued consecutively since American United commenced operation at the Facility.

Additionally, American United has discharged pollution without a permit in violation of Section 301(a) of the CWA on every day since American United commenced operations at the Facility on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if American United seeks permit coverage after receiving this letter but fail to fully comply with the requirements of the General Permit (or an individual permit), each day upon which American United claims coverage under a NPDES permit but fail to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

American United is liable for the above-described violations occurring prior to the date of this letter, and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available to Baykeeper after the date of this Notice of Intent to File Suit.⁵⁹ These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995)

⁵⁸ See also 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

⁵⁹ See, e.g. *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.")

Baykeeper will ask the court to order American United to comply with the Clean Water Act, to pay penalties, and to pay Baykeeper's costs and legal fees.

First, Baykeeper will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d) and such other relief as permitted by law. Baykeeper will seek an order from the Court requiring American United to obtain NPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Second, pursuant to Section 309(d) of the CWA,⁶⁰ each separate violation of the CWA subjects American United to a penalty not to exceed \$37,500 per day for each violation that occurred after January 12, 2009.⁶¹ Baykeeper will seek the full penalties allowed by law.

Third and lastly, pursuant to Section 505(d) of the CWA, Baykeeper will seek recovery of their litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper)
52 West Front Street
Keyport, NJ 07735
(732) 888-9870
Attn.: Debbie Mans, Executive Director

VIII.

IDENTIFICATION OF COUNSEL

Baykeeper is represented by legal counsel in this matter. The name, address, and telephone number of Baykeeper's attorneys are:

Edan Rotenberg
Nicholas W. Tapert
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038

⁶⁰ 33 U.S.C. § 1319(d); *see also* 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

⁶¹ 40 C.F.R. § 19.2.

(212) 242-2355

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit American United to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.⁶²

If American United has developed a SWPPP, Baykeeper requests that American United send a copy to the undersigned attorney.⁶³ Otherwise, Baykeeper encourages American United to begin developing a SWPPP immediately after receiving this letter and ask that American United please inform the undersigned attorney of American United's efforts so that Baykeeper can work with American United to avoid disputes over the contents of the SWPPP.⁶⁴

⁶² 40 C.F.R. § 135.3(a).

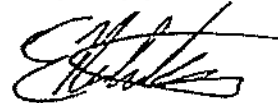
⁶³ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁶⁴ Baykeeper will not send a new notice letter in response to any effort American United makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Affg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

Notice of Violation and Intent to File Suit
March 14, 2016
Page 17 of 17

During the sixty-day notice period, Baykeeper is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If American United wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty days.

Very truly yours,



Edan Rotenberg, Esq.
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355

cc:

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